

Chapter 4

Evictions, Leases, Installment Contracts, Mortgages and Similar Protections

4-1. Introduction

Title III of the SCRA (50 U.S.C. §§ 531-537) provides for a number of similar benefits and protections. For example, it provides protection against eviction¹ and protection against repossession of property.² This chapter will examine the Title III protections and benefits as well as certain other related provisions.

4-2. Extension of Benefits to Dependents

All Title III protections are applicable to dependents³ in their own right. The applicable section indicates that “[u]pon application to a court, a dependent of a servicemember is entitled to the protections of this title if the dependent’s ability to comply with a lease, contract, bailment, or other obligation is materially affected by reason of the servicemember’s military service.”⁴ Congress added this section’s predecessor in 1942 to avoid situations in which dependents suffered as a result of the servicemember’s period of service.

Perhaps the most important thing to note about this provision is that the servicemember’s military service must materially affect the dependent’s ability to comply with the obligation in question.⁵ Under the terms of this section, dependents of military personnel may apply to a court

¹ 50 U.S.C.S. app. § 531 (LEXIS 2006).

² *Id.* app. § 532.

³ It is worth remembering that the definition of “dependents” is broader than the spouse and children of the servicemember.

The term ‘dependent,’ with respect to a servicemember, means (A) the servicemember’s spouse; (B) the servicemember’s child (as defined in section 101(4) of title 38, United States Code); or (C) an individual for whom the servicemember provided more than one-half of the individual’s support for 180 days immediately preceding an application for relief under this Act.

Id. app. § 511(4).

⁴ *Id.* app. § 538.

⁵ It is instructive to compare the current provision with the older one:

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for the benefits of all the sections under Title III. If the court finds that the dependent's ability to comply with the terms of a contract or other obligation is materially affected by the military service of the person upon whom he or she is dependent, then the court is authorized to grant the dependent at least the same degree of relief to which the servicemember would be entitled.⁶ At least one court has held that the benefit is available even for property acquired prior to marrying a servicemember.⁷ Another has held that Title III protection against eviction⁸ exists even after a marriage when the former spouse is still financially dependent on the servicemember.⁹

4-3. Eviction and Distress

The SCRA protects against the eviction of servicemembers:

50 U.S.C. app. § 531

(a) Court--ordered eviction.

(1) In general. Except by court order, a landlord (or another person with paramount title) may not----

(A) evict a servicemember, or the dependents of a servicemember, during a period of military service of the servicemember, from premises----

Dependents of a person in military service shall be entitled to the benefits accorded to persons in military service under the provisions of this article upon application to a court therefore, unless in the opinion of the court the ability of such dependents to comply with the terms of the obligation, contract, lease, or bailment has not been materially impaired by reason of the military service of the person upon whom the applicants are dependent.

50 U.S.C. app. § 536 (2000).

⁶ See, e.g., *Reid v. Margolis*, 44 N.Y.S.2d 518 (1943); *Pfeiffer v. McGarvey*, 61 F. Supp. 570 (E.D. Pa. 1945).

⁷ *Tucson Telco & Fed. Credit Union v. Bowser*, 451 P.2d 322 (Ariz. Ct. App. 1969).

⁸ 50 U.S.C.S. app. § 531 (LEXIS 2006).

⁹ *Balconi v. Dvascas*, 507 N.Y.S.2d 788 (1986).

- (i) that are occupied or intended to be occupied primarily as a residence; and
- (ii) for which the monthly rent does not exceed \$2,400, as adjusted under paragraph (2) for years after 2003; or

(B) subject such premises to a distress during the period of military service.

(2) Housing price inflation adjustment.

(A) For calendar years beginning with 2004, the amount in effect under paragraph (1)(A)(ii) shall be increased by the housing price inflation adjustment for the calendar year involved.

(B) For purposes of this paragraph----

(i) The housing price inflation adjustment for any calendar year is the percentage change (if any) by which----

(I) the CPI housing component for November of the preceding calendar year, exceeds

(II) the CPI housing component for November of 1984.

(ii) The term “CPI housing component” means the index published by the Bureau of Labor Statistics of the Department of Labor known as the Consumer Price Index, All Urban Consumers, Rent of Primary Residence, U.S. City Average.

(3) Publication of housing price inflation adjustment. The Secretary of Defense shall cause to be published in the Federal Register each year the amount in effect under paragraph (1)(A)(ii) for that year following the housing price inflation adjustment for that year pursuant to paragraph (2). Such publication shall be made for a year not later than 60 days after such adjustment is made for that year.

(b) Stay of execution.

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(1) Court authority. Upon an application for eviction or distress with respect to premises covered by this section, the court may on its own motion and shall, if a request is made by or on behalf of a servicemember whose ability to pay the agreed rent is materially affected by military service----

(A) stay the proceedings for a period of 90 days, unless in the opinion of the court, justice and equity require a longer or shorter period of time; or

(B) adjust the obligation under the lease to preserve the interests of all parties.

(2) Relief to landlord. If a stay is granted under paragraph (1), the court may grant to the landlord (or other person with paramount title) such relief as equity may require.

(c) Penalties.

(1) Misdemeanor. Except as provided in subsection (a), a person who knowingly takes part in an eviction or distress described in subsection (a), or who knowingly attempts to do so, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.

(2) Preservation of other remedies and rights. The remedies and rights provided under this section are in addition to and do not preclude any remedy for wrongful conversion (or wrongful eviction) otherwise available under the law to the person claiming relief under this section, including any award for consequential and punitive damages.

(d) Rent allotment from pay of servicemember. To the extent required by a court order related to property which is the subject of a court action under this section, the Secretary concerned shall make an allotment from the pay of a servicemember to satisfy the terms of such order, except that any such allotment shall be subject to regulations prescribed by the Secretary concerned establishing the maximum amount of pay of servicemembers that may be allotted under this subsection.

(e) Limitation of applicability. Section 202 [50 U.S.C. app. § 522] is not applicable to this section.¹⁰

This section protects servicemembers and their dependents from eviction for nonpayment of rent. It does not preclude eviction, but it does set up the process through which that remedy must pass. Notwithstanding any process that might be permitted under state law, the landlord must obtain a court order. Upon the servicemember's or family member's request and upon a showing that there is material effect, the court must stay the proceeding for roughly ninety days.¹¹ Additionally, the court may "adjust the obligation under the lease to preserve the interests of all parties"¹² and if it grants a stay it "may grant to the landlord (or other person with paramount title) such relief as equity may require."¹³

The SCRA does not define "eviction" or "distress," but "[t]here is nothing to indicate that the terms . . . are used to imply anything other than the usually and commonly accepted meaning[s]."¹⁴ "Eviction," then, simply enough, "is dispossession of a tenant by a landlord."¹⁵

As of January 2006, servicemembers were protected if the rent did not exceed \$2615.16. As originally enacted, the rent could not exceed \$2400.00 in order for the protection to apply.¹⁶

¹⁰ 50 U.S.C. app. § 531.

¹¹ The SCRA is a bit open-ended on this point indicating that the court shall "stay the proceedings for a period of 90 days, unless in the opinion of the court, justice and equity require a longer or shorter period of time." *Id.* app. § 531(b)(1)(A).

¹² *Id.* app. § 531(b)(1)(B).

¹³ *Id.* app. § 531(b)(2). It is not entirely clear how these last two provisions are meant to work. Obviously, the court might adjust the obligation so that the landlord is not at some complete loss. Perhaps if a mobilization were to be of short duration, the equitable relief might be for the servicemember/tenant to pay the difference off over a period of time when s/he returns from active duty. In one case, the court stayed the eviction. During the period of the eviction, the servicemember did not pay any rent, but offered to pay the fourth month's rent; that is, the rent due for the month following the stay. The court accepted this offer rather than grant the landlord the eviction, but ordered that the rent for the period of the stay was still due and owing. *See Jonda Realty Corp. v. Marabotto*, 34 N.Y.S.2d 301 (Sup. Ct. 1942).

¹⁴ *Lesh v. Louisville Gas & Elec. Co.*, 49 F. Supp. 88, 89 (W.D. Ky. 1943).

¹⁵ *Id.*

¹⁶ 50 U.S.C. app. § 531(a)(1)(A)(ii).

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The \$2615.16 figure represents the annual adjustment for inflation¹⁷ as published annually¹⁸ in the Federal Register.¹⁹ This annual increase will obviously warrant attention.

Section 531 provides criminal sanctions against those who knowingly take part in the eviction or attempted eviction of the spouse, children, or other dependents of a servicemember from any premises occupied as a dwelling and rented for less than \$2615.16.²⁰ This sanction is in addition to “other rights and remedies” that may be available to the servicemember.²¹ In fact, a violation of this section may also support an action for damages for wrongful eviction to include an award of punitive damages.²²

Courts have required that a landlord-tenant relationship exist as this section contemplates a disturbance of that relationship. The extension of these provisions beyond landlords to include “other person[s] with paramount title”²³ is interesting. It evinces Congress’s perceived need “to eliminate the conflict between courts regarding the relationship required to invoke the eviction protections of this section.”²⁴ In doing so, Congress meant to adopt the more liberal, if not realistic, approach taken in *Clinton Cotton Mills v. United States*.²⁵ In that case, the servicemember, Charles Thomas, had worked for Clinton Cotton Mills and had rented company

¹⁷ *Id.* app. § 531(a)(2)(A).

¹⁸ *Id.* app. § 531(a)(3).

¹⁹ For 2006, *see* Publication of Housing Price Inflation Adjustment Under 50 U.S.C. app. § 531, 71 Fed. Reg. 2530 (Jan. 17, 2006). In 2005, the amount was \$2534.32. *See* Publication of Housing Price Inflation Adjustment Under 50 U.S.C. app. § 531, 701 Fed. Reg. 2395 (Jan. 13, 2005). In 2004, shortly after the SCRA’s adoption, the amount was \$2465.00. *See* Publication of Housing Price Inflation Adjustment Under Public Law 108-189, Section 301, Fed. Reg. 1281 (Jan. 8, 2004).

²⁰ 50 U.S.C. app. § 531(c)(1).

²¹ *Id.* app. § 531(c)(2).

²² *See, e.g.,* *Prather v. Clover Spinning Mills, Inc.*, 54 S.E.2d 529, 535 (1949)(“Defendants’ failure to follow the Federal statute, with knowledge of plaintiff’s dependence upon her son in the service, to which she testified, fully justified the verdict for punitive damages”).

²³ 50 U.S.C. app. § 531(a)(1).

²⁴ H.R. REP. NO.108-81, at 40 (2003).

²⁵ 164 F.2d 173 (4th Cir. 1947).

housing from the mill prior to his induction into the armed forces. The trial court convicted the defendant cotton mill for the misdemeanor crime of wrongful eviction, when it evicted Thomas's family from company housing following the termination of his employment and induction.²⁶ Following the first eviction, the servicemember's family began residing at the home of another company employee, Roy Ramsey, who rented company housing from the mill. This meant that Ramsey was technically the Thomas's' landlord. The company was held liable for this second count of wrongful eviction when it threatened to evict Ramsey if the Thomases did not leave. The court stated that "a tenant can be evicted only by his landlord, but this is not true when a tenant is deprived of possession by one who has title paramount to the tenant's immediate landlord . . ."²⁷ Congress highlighted its choice of outcome by contrasting the result in *Clinton* to that in *Arkless v. Kilstein*.²⁸ In *Arkless*, the district court had held that "the Act refers to, in its commonly accepted legal interpretation, to a dispossession of a tenant by a landlord, and not to any disturbance of the tenant's right to possession and quiet enjoyment of the premises by a third party."²⁹

Section 531(d) provides for the possibility that allotments may be taken from a servicemember's pay.³⁰ This requires secretarial implementation and currently there is no procedure authorized.³¹

4-4. Residential Leases

In addition to the protections against evictions,³² the SCRA allows servicemembers to terminate residential leases. In fact, the SCRA, in contrast to the SSCRA, has expanded this gamut of protections and added similar protections for servicemembers who lease automobiles. Practitioners will undoubtedly conclude that this section must be read with a degree of care. The portions which deal with residential leases and those concerning automobile leases are similar,

²⁶ *Id.* at 174-5.

²⁷ *Id.* at 176.

²⁸ 61 F. Supp. 886 (E.D. Pa. 1944). *See also* H.R. REP. NO.108-81, at 40.

²⁹ *Arkless*, 61 F. Supp. at 888.

³⁰ 50 U.S.C. app. § 531(d).

³¹ U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION vol. 7A, ch. 50 (July 2005).

³² *See* 50 U.S.C. app. § 531. *See also supra* para. 4-3.

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but they operate under different timelines. Thus, care must be taken to avoid using or advocating from the wrong timeline.

In any event, the entire section is as follows:
50 U.S.C. app. § 535

(a) Termination by lessee.

(1) In general. The lessee on a lease described in subsection (b) may, at the lessee's option, terminate the lease at any time after---

(A) the lessee's entry into military service; or

(B) the date of the lessee's military orders described in paragraph (1)(B) or (2)(B) of subsection (b), as the case may be.

(2) Joint leases. A lessee's termination of a lease pursuant to this subsection shall terminate any obligation a dependent of the lessee may have under the lease.

(b) Covered leases. This section applies to the following leases:

(1) Leases of premises. A lease of premises occupied, or intended to be occupied, by a servicemember or a servicemember's dependents for a residential, professional, business, agricultural, or similar purpose if---

(A) the lease is executed by or on behalf of a person who thereafter and during the term of the lease enters military service; or

(B) the servicemember, while in military service, executes the lease and thereafter receives military orders for a change of permanent station or to deploy with a military unit, or as an individual in support of a military operation, for a period of not less than 90 days.

(2) Leases of motor vehicles. A lease of a motor vehicle used, or intended to be used, by a servicemember or a servicemember's dependents for personal or business transportation if---

(A) the lease is executed by or on behalf of a person who thereafter and during the term of the lease enters military service under a call or order specifying a period of not less than 180 days (or who

enters military service under a call or order specifying a period of 180 days or less and who, without a break in service, receives orders extending the period of military service to a period of not less than 180 days); or

(B) the servicemember, while in military service, executes the lease and thereafter receives military orders----

(i) for a change of permanent station----

(I) from a location in the continental United States to a location outside the continental United States; or

(II) from a location in a State outside the continental United States to any location outside that State; or

(ii) to deploy with a military unit, or as an individual in support of a military operation, for a period of not less than 180 days.

(c) Manner of termination.

(1) In general. Termination of a lease under subsection (a) is made----

(A) by delivery by the lessee of written notice of such termination, and a copy of the servicemember's military orders, to the lessor (or the lessor's grantee), or to the lessor's agent (or the agent's grantee); and

(B) in the case of a lease of a motor vehicle, by return of the motor vehicle by the lessee to the lessor (or the lessor's grantee), or to the lessor's agent (or the agent's grantee), not later than 15 days after the date of the delivery of written notice under subparagraph (A).

(2) Delivery of notice. Delivery of notice under paragraph (1)(A) may be accomplished----

(A) by hand delivery;

(B) by private business carrier; or

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(C) by placing the written notice in an envelope with sufficient postage and with return receipt requested, and addressed as designated by the lessor (or the lessor's grantee) or to the lessor's agent (or the agent's grantee), and depositing the written notice in the United States mails.

(d) Effective date of lease termination.

(1) Lease of premises. In the case of a lease described in subsection (b)(1) that provides for monthly payment of rent, termination of the lease under subsection (a) is effective 30 days after the first date on which the next rental payment is due

and payable after the date on which the notice under subsection (c) is delivered. In the case of any other lease described in subsection (b)(1), termination of the lease under subsection (a) is effective on the last day of the month following the month in which the notice is delivered.

(2) Lease of motor vehicles. In the case of a lease described in subsection (b)(2), termination of the lease under subsection (a) is effective on the day on which the requirements of subsection (c) are met for such termination.

(e) Arrearages and other obligations and liabilities. Rents or lease amounts unpaid for the period preceding the effective date of the lease termination shall be paid on a prorated basis. In the case of the lease of a motor vehicle, the lessor may not impose an early termination charge, but any taxes, summonses, and title and registration fees and any other obligation and liability of the lessee in accordance with the terms of the lease, including reasonable charges to the lessee for excess wear, use and mileage, that are due and unpaid at the time of termination of the lease shall be paid by the lessee.

(f) Rent paid in advance. Rents or lease amounts paid in advance for a period after the effective date of the termination of the lease shall be refunded to the lessee by the lessor (or the lessor's assignee or the assignee's agent) within 30 days of the effective date of the termination of the lease.

(g) Relief to lessor. Upon application by the lessor to a court before the termination date provided in the written notice, relief granted by this section to a servicemember may be modified as justice and equity require.

(h) Penalties.

(1) Misdemeanor. Any person who knowingly seizes, holds, or detains the personal effects, security deposit, or other property of a servicemember or a servicemember's dependent who lawfully terminates a lease covered by this section, or who knowingly interferes with the removal of such property from premises covered by such lease, for the purpose of subjecting or attempting to subject any of such property to a claim for rent accruing subsequent to the date of termination of such lease, or attempts to do so, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.

(2) Preservation of other remedies. The remedy and rights provided under this section are in addition to and do not preclude any remedy for wrongful conversion otherwise available under law to the person claiming relief under this section, including any award for consequential or punitive damages.

(i) Definitions.

(1) Military orders. The term "military orders," with respect to a servicemember, means official military orders, or any notification, certification, or verification from the servicemember's commanding officer, with respect to the servicemember's current or future military duty status.

(2) CONUS. The term "continental United States" means the 48 contiguous States and the District of Columbia.³³

This section of the Act differs from the section concerning evictions.³⁴ It provides a method by which the servicemember-lessee rather than the lessor, may terminate a lease. Its scope is not limited by either the amount of the agreed rent or the nature of the premises. In further contrast, this section does not require that the lessee's ability to perform be materially affected by his/her military service.

Servicemembers who come to active duty from the reserve components or those who join the armed forces³⁵ are allowed to terminate their "residential, professional, business, [or]

³³ 50 U.S.C. app. § 535.

³⁴ *Id.* app. § 531. *See also supra* para. 4-3.

³⁵ 50 U.S.C. app. § 535(a)(1)(B).

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agricultural”³⁶ leases. They must do this in writing, however.³⁷ As a concession to the lessor, the termination “is effective 30 days after the first date on which the next rental payment is due and payable”³⁸ and after the notice has been delivered.³⁹ For example, in the case of a month-to-month rental, the termination becomes effective 30 days after the first date on which the next rental payment is due subsequent to the date when the notice of termination is delivered. If the rent is due on the first day of each month, and notice is mailed on 1 August, then “the next rental payment is due and payable” on 1 September. Thirty days after that date would be 1 October.

There is also the possibility that a lessor may obtain equitable relief,⁴⁰ the lessor may, during the period from his/her receipt of notice to the effective date of termination, petition the appropriate court for relief from the lease termination. Landlords may petition the court on grounds of “undue hardship” or countervailing equitable consideration or for an “equitable offset” for lease termination. Such an “equitable offset” would most likely be granted in commercial or professional lease terminations. “Equitable offset” could include lost rent, realty fees for re-rental, depreciation in rental value of premises because of tenant-requested fixtures, and attorney fees and costs.⁴¹ In addition, if the servicemember requires the lessor to modify the property and subsequently terminates the lease, the lessor may charge the lessee for the alterations.⁴² This occurs only if the lessee knew of the impending call to active duty at the time the lessee requested the modifications.⁴³

Although there is a possibility that equity will require relief to the lessor, the servicemember’s ability to terminate a lease is a clearly defined protection. Thus, “a court in

³⁶ *Id.* app. § 535(b)(1).

³⁷ *Id.* app. § 535(c).

³⁸ *Id.* app. § 535(d)(1).

³⁹ *Id.*

⁴⁰ *Id.* app. § 535(g).

⁴¹ *Omega Indus. v. Raffaele*, 894 F. Supp. 1425, 1430 (D. Nev., 1995) (“For example, if a military person who knows that he or she will soon be invoking [50 U.S.C. app. § 535] to terminate an existing lease – wrongfully induces a lessor to make tenant improvements, a court may find that equity requires that an equitable remedy be granted in an amount equal to both the cost of those improvements and the monthly rental obligations of that military person”).

⁴² *Id.*

⁴³ *Id.*

equity must exercise extreme caution in withholding the protection.”⁴⁴ The law makes it clear that prepaid rents, for instance, are to be returned to the lessee 30 days after “the effective date of termination.”⁴⁵ As with other Title III protections, violations can be criminally sanctioned⁴⁶ and damages from a lessor’s actions, to include punitive damages, can also be obtained.⁴⁷

Perhaps the most important thing to note about this provision is that it is applicable when a servicemember is transferred from one duty location to another or when ordered to deploy “for a period of not less than 90 days.”⁴⁸ In the past, legal assistance practitioners have been concerned to see that members of their command execute leases with so called “military clauses.” Leases with these provisions allow for the early termination of a lease when a servicemember is notified of a transfer to a new duty assignment. Even though a servicemember would be well advised to still include such a clause, the SCRA obviates the need to contract for this relief.

Another very important aspect of the protection concerns the fact that it applies to joint leases.⁴⁹ This provision is important for those servicemembers who deploy with a unit and who leave a spouse behind who wishes to reside somewhere other than near the servicemember’s duty station. That spouse’s obligation is terminated along with that of the servicemember’s.⁵⁰

Taking this a step further, it should be noted as well that one would normally think of a servicemember’s co-tenant spouse as the person with a need to terminate the lease. The law, as it turns out, is a bit broader allowing for the termination by not just a spouse, but by any dependent who has signed the lease with the servicemember.⁵¹ A “dependent” includes a spouse, but also “an individual for whom the servicemember provided more than one-half of the individual’s support for 180 days immediately preceding an application for relief.”⁵² One can

⁴⁴ *Id.* at 1434.

⁴⁵ 50 U.S.C. app. § 535(f).

⁴⁶ *Id.* app. § 535(h)(1).

⁴⁷ *Id.* app. § 535(h)(2).

⁴⁸ *Id.* app. § 535(b)(1)(B).

⁴⁹ *Id.* app. § 535(a)(2).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* app. § 511(4).

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certainly imagine situations involving an elderly parent who needs to terminate a lease while the servicemember is deployed.

4-5. Automobile Leases

The SCRA's automobile provisions⁵³ truly bring the law into the modern era. Although the scheme is parallel to the portion of the law concerning residential leases, practitioners should note that the period of active duty is longer if the protections are to be effective. While residential leases may be terminated when a servicemember enters active duty for a period of 90 days,⁵⁴ an automobile lease may only be terminated after 180 days.⁵⁵

Servicemembers may also terminate their automobile leases when they receive orders for a permanent change of station (PCS) from a posting in the continental United States to another location outside the continental United States.⁵⁶ If they are stationed outside the continental United States, but in a United States territory or state, they may terminate the lease if they are transferred to the continental United States or to another state or territory outside the continental United States.⁵⁷ Finally, servicemembers who are not subject to a PCS, but who "deploy with a military unit, or as an individual in support of a military operation,"⁵⁸ may also seek relief if the deployment is for at least 180 days.⁵⁹

4-6. Installment Contracts

Under Section 532, the SCRA protects servicemembers who enter into installment contracts prior to entry on active duty:

50 U.S.C. app. § 532

(a) Protection upon breach of contract.

⁵³ *Id.* app. § 535(b)(2).

⁵⁴ *Id.* app. § 535(b)(1)(B).

⁵⁵ *Id.* app. § 535(b)(2)(A).

⁵⁶ *Id.* app. § 535(b)(2)(B)(i)(I).

⁵⁷ *Id.* app. § 535(b)(2)(B)(i)(II).

⁵⁸ *Id.* app. § 535(b)(2)(B)(ii).

⁵⁹ *Id.*

(1) Protection after entering military service. After a servicemember enters military service, a contract by the servicemember for----

(A) the purchase of real or personal property (including a motor vehicle); or

(B) the lease or bailment of such property, may not be rescinded or terminated for a breach of terms of the contract occurring before or during that person's military service, nor may the property be repossessed for such breach without a court order.

(2) Applicability. This section applies only to a contract for which a deposit or installment has been paid by the servicemember before the servicemember enters military service.

(b) Penalties.

(1) Misdemeanor. A person who knowingly resumes possession of property in violation of subsection (a), or in violation of section 107 of this Act [50 U.S.C. app. § 517], or who knowingly attempts to do so, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.

(2) Preservation of other remedies and rights. The remedies and rights provided under this section are in addition to and do not preclude any remedy for wrongful conversion otherwise available under law to the person claiming relief under this section, including any award for consequential and punitive damages.

(c) Authority of court. In a hearing based on this section, the court----

(1) may order repayment to the servicemember of all or part of the prior installments or deposits as a condition of terminating the contract and resuming possession of the property;

(2) may, on its own motion, and shall on application by a servicemember when the servicemember's ability to comply with the contract is

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materially affected by military service, stay the proceedings for a period of time as, in the opinion of the court, justice and equity require; or

(3) may make other disposition as is equitable to preserve the interests of all parties.⁶⁰

a. Installment Contract Basics. The first and foremost protection offered by this section is that repossession of either real or personal property, being purchased under an installment contract, may not be repossessed from a defaulting servicemember unless there is a court order.⁶¹ The vendor is, in other words, prohibited from exercising any right or option under the contract to rescind or terminate the contract, to resume possession of the property for nonpayment of any installment due, or to breach the terms, except by action in a court of competent jurisdiction. Again, this must be a contract that existed prior to the servicemember's entry on active duty. Contracts entered into following entry on active duty are not covered.⁶² It is immaterial, however, whether the nonpayment or other breach occurs prior to or during the period of military service. If the contract was entered into prior to military service and if an installment or deposit has been made, then the creditor must apply to a court before seeking to repossess or otherwise dispose of the property.⁶³

A knowing violation of this provision of the SCRA can result in a misdemeanor conviction.⁶⁴ Property repossessed without benefit of the requisite court action will subject the creditor to a suit for wrongful conversion.⁶⁵

⁶⁰ *Id.* app. § 532.

⁶¹ *Id.* app. § 532(a)(1)(b). *See, e.g.,* *Hanson v. Crown Toyota Motors, Inc.*, 572 P.2d 380 (Utah, 1977).

⁶² 50 U.S.C. app. § 532(a)(2). *See, e.g.,* *Jim's Trailer Sales, Inc. v. Shutok*, 153 F. Supp. 274 (W.D. Pa. 1957); *Charles H. Jenkins & Co., Inc. v. Lewis*, 130 S.E.2d 49 (1963).

⁶³ *See, e.g.,* *Hampton v. Commercial Credit Corp.*, 176 P.2d 270 (1946).

⁶⁴ 50 U.S.C. app. § 532(b)(1). Other remedies, such as consequential and punitive damages, are also available. *Id.* app. § 532(b)(2).

⁶⁵ *See Hanson.*, 572 P.2d 380; *Pac. Fin. Corp. v. Gilkerson*, 217 S.W.2d 440 (Tex. Civ. App. 1949); *Application of Aber*, 40 N.Y.S.2d 48 (Sup. Ct. 1942). *See also Hampton*, 176 P.2d 270 (lack of evidence, but "exemplary damages" a consideration under former SSCRA).

There are three other remedies available under section 532. First, when one of these matters comes before the court, the court can on its own decide to stay the proceeding “for a period of time, as in the opinion of the court, justice and equity require.”⁶⁶ The court must stay the proceeding if the servicemember makes a request for the stay and if there is a showing that the servicemember’s military service has materially affected the servicemember’s ability to meet the obligation.⁶⁷ The court can also “make other disposition as is equitable to preserve the interests of all parties.”⁶⁸ Third, if the court concludes that the property is subject to repossession, it may also “order repayment to the servicemember of all or part of the prior installments or deposits.”⁶⁹

b. Material Effect. As to the installment provision, it is most important to note that material effect is only a requirement when the court looks to stay the matter pending final resolution. Under the prior law, it was possible to argue that material effect was a necessary element if the servicemember were to have the contract terminated and the installments repaid.⁷⁰

⁶⁶ *Id.* app. § 532(c)(2).

⁶⁷ *Id.*

⁶⁸ *Id.* app. § 532(c)(3).

⁶⁹ *Id.* app. 532(c)(1). *See also id.* app. § 534 (appraisal and payment of equity in repossessed property). There are few cases that examine or otherwise provide guidance on how a court might come to this equitable balance. In one case, nonetheless, where the court found that a servicemember’s ability to comply had been materially affected by his military service, but any delay in enforcement would impose an “unnecessary, unexpected and unjustifiable hardship” on the creditor, “without bringing any benefit to” the servicemember, the court refused to grant a stay and resorted to its equitable powers to resolve the dilemma. *Assocs. Discount Corp. v. Armstrong*, 33 N.Y.S.2d 36, 38 (Rochester City Ct. 1942). Because the value of the security exceeded the amount due under the contract, the property was ordered sold, thereby terminating the servicemember’s liability while the creditor received the balance due on the contract. *Id.* at 38-9. In another case in which the security for the obligation would have been destroyed or so diminished in value as to render it useless, the court ordered it sold and the proceeds divided proportionately. *Holtzman’s Furniture Store v. Schrapf*, 39 So.2d 450, (La. App., 1949).

⁷⁰ *See* 50 app. § 532(c)(2). The former provision, which lumped the three remedies together, was as follows:

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There is also better logic to the notion that material effect is an implicit element if the court considers adjusting the equities.⁷¹ In fact, under the prior law, some courts read this requirement into the statute⁷² while others would not.⁷³

That being said, the question becomes one of what constitutes material effect when that issue is properly before the court. In determining whether military service materially affects a servicemember's ability to meet his/her obligations, the court may compare his/her financial condition prior to entry on active duty with his/her condition while in military service.⁷⁴ Another factor that courts have considered is when the default or noncompliance by the servicemember began. When a pattern of noncompliance was begun long before the debtor's induction into the service, it can support a conclusion that military service was not the cause of the debtor's inability to meet the obligation.⁷⁵ Consequently, the servicemember seeking relief under this section must show hardship or material effect before he/she is entitled to protection under this section of the Act.

Upon the hearing of such action the court may order the repayment of prior installments or deposits or any part thereof, as a condition of terminating the contract and resuming possession of the property, or may, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, order a stay of proceedings as provided in this Act unless, in the opinion of the court, the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such service; or it may make such other disposition of the case as may be equitable to conserve the interest of all parties.

50 U.S.C. app. § 531(3) (2000). Congress, in adopting the SCRA, has obviously enumerated the provisions and distinctly separated the three remedies.

⁷¹ 50 U.S.C. app. § 532(c)(3).

⁷² In one case involving the purchase of furniture, the court noted that "the . . . family now receives but a few dollars less than the gross earnings of defendant before his enlistment." *Holtzman's Furniture Store*, 39 So.2d at 455 (La. App., 1949). In deference to the vendor, the court likewise noted that "[n]o one will doubt for a moment that modern furniture does not improve with usage, and should the plaintiff herein be met with a stay order, there is no question that disadvantage would result." *Id.* See also *Reese v. Bacon*, 176 S.W.2d 971 (Tex. App., 1943).

⁷³ *Hanson v. Crown Toyota Motors, Inc.*, 572 P.2d 380 (Utah, 1977).

⁷⁴ See, e.g., *Harvey v. Home Owners' Loan Corp.*, 67 N.Y.S.2d 586 (1946).

⁷⁵ See *Creamer v. Ansopiano*, 52 N.Y.S.2d 862 (Sup. Ct. 1945); *Reese*, 176 S.W.2d 971.

c. View to Purchase. Under the prior law the statute on installment contracts indicated that the protections and benefits were limited to those situations involving “a contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property.”⁷⁶ It should not go unnoted that the SCRA does not contain this language. As the House Committee on Veterans’ Affairs explained, this was meant “to expand the section’s protections to non-purchase leases, including leases for automobiles, business or professional equipment, farm equipment and other similar property.”⁷⁷

⁷⁶ 50 U.S.C. app. § 531(1) (2000).

⁷⁷ H.R. REP. NO.108-81, at 40 (2003).

4-7. Mortgages

The SCRA has provisions which affect mortgage foreclosures. The benefits, protections, and procedures are similar to others found in Title III. They are particularly similar to those involving installment contracts. The mortgage provision, however, is specifically designed to protect servicemembers against foreclosure of mortgages and other security interests. Although both are applicable to real or personal property transactions, the installment contract provision does not require a security interest in the property. Given their similarity, decisions rendered under one provision may find utility under either. In any event, the mortgage provision is as follows:

50 U.S.C. app. § 533

(a) Mortgage as security. This section applies only to an obligation on real or personal property owned by a servicemember that---

(1) originated before the period of the servicemember's military service and for which the servicemember is still obligated; and

(2) is secured by a mortgage, trust deed, or other security in the nature of a mortgage.

(b) Stay of proceedings and adjustment of obligation. In an action filed during, or within 90 days after, a servicemember's period of military service to enforce an obligation described in subsection (a), the court may after a hearing and on its own motion and shall upon application by a servicemember when the servicemember's ability to comply with the obligation is materially affected by military service----

(1) stay the proceedings for a period of time as justice and equity require, or

(2) adjust the obligation to preserve the interests of all parties.

(c) Sale or foreclosure. A sale, foreclosure, or seizure of property for a breach of an obligation described in subsection (a) shall not be valid if made during, or within 90 days after, the period of the servicemember's military service except----

(1) upon a court order granted before such sale, foreclosure, or seizure with a return made and approved by the court; or

(2) if made pursuant to an agreement as provided in section 107 [50 U.S.C. app. § 517.]

(d) Penalties.

(1) Misdemeanor. A person who knowingly makes or causes to be made a sale, foreclosure, or seizure of property that is prohibited by subsection (c), or who knowingly attempts to do so, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.

(2) Preservation of other remedies. The remedies and rights provided under this section are in addition to and do not preclude any remedy for wrongful conversion otherwise available under law to the person claiming relief under this section, including consequential and punitive damages.⁷⁸

a. Mortgage Foreclosure Basics. This section applies to purchases of real or personal property that a servicemember makes prior to entry on active duty that are secured by a mortgage or trust deed.⁷⁹ If a servicemember breaches the obligation, a sale, foreclosure, or repossession action is not valid unless there is a court order or a waiver from the servicemember.⁸⁰ This protection is in addition to any state protection or requirement and extends ninety days beyond the servicemember's period of service.⁸¹ Those who violate the provision could suffer a federal misdemeanor conviction⁸² as well as a civil judgment for punitive damages and the like.⁸³ Of central importance, however, is a provision calling for a stay. A court can grant this relief on its own motion, but it must take action at the request of a servicemember following a showing of

⁷⁸ 50 U.S.C.S. app. § 533 (LEXIS 2006). Section 517, referenced in section 533, concerns waivers of SCRA protections that servicemembers may execute once they are entitled to those protections. *See id.* app. § 517. *See also supra* para. 2-5.

⁷⁹ 50 U.S.C. app. § 533(a).

⁸⁰ *Id.* app. § 533(c)(2). *See, e.g.,* Engstrom v. First Nat'l Bank of Eagle Lake, 47 F.3d 1459 (5th Cir. 1995).

⁸¹ 50 U.S.C. app. § 533(c).

⁸² *Id.* app. § 533 (d)(1).

⁸³ *Id.* app. § 533 (d)(2).

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material effect.⁸⁴ Finally, there is a provision which allows a court to make an equitable adjustment.⁸⁵

b. Ownership. The Act requires the servicemember (or his/her dependent)⁸⁶ to have “owned”⁸⁷ the mortgaged property prior to his/her entry upon active duty, continuing up to the time relief is sought from the court. Several questions relating to the nature of the ownership required to bring an obligation within the Act’s coverage have been litigated.

Generally, the courts have interpreted the word “owned” to mean equitable and legal interests in property. This was the usage given under the Act of 1918⁸⁸ and the same meaning was applied to the SSCRA.⁸⁹ While the weight of authority supports this proposition, difficulties arise when innocent third parties who are purchasers for value without notice are involved. In these instances, the courts avoid exercising their equitable powers in favor of the servicemember by stating that “equitable” title must be recorded.⁹⁰

c. Material Effect. In order for the court to stay or adjust the obligation, there must be a showing that the servicemember’s military service materially affects his/her “ability to comply with the obligation.”⁹¹

A mortgagee bringing a foreclosure action will provide the court with proof of the existence and the extent of the mortgage debt upon which suit is instituted and the date of default in payment. If favorable to him/her the mortgagee will often present the mortgagor’s pre-service payment

⁸⁴ *Id.* app. § 533(b)(1).

⁸⁵ *Id.* app. § 533(b)(2).

⁸⁶ *Id.* app. § 538.

⁸⁷ *Id.* app. § 533(a).

⁸⁸ *Morse v. Stober*, 123 N.E. 780 (1919); *Hoffman v. Charlestown Five Cent Savings Bank*, 231 Mass. 324, 121 N.E. 15 (1918).

⁸⁹ *Fourth Nat’l Bank in Wichita v. Hill*, 314 P.2d 312 (1957) (equitable title not established); *Twitchell v. Home Owners’ Loan Corp.*, 122 P.2d 210 (1942) (equitable interest established and servicemember/son allowed to intervene in case involving foreclosure against his mother).

⁹⁰ *See, e.g., Godwin v. Gerling*, 239 S.W.2d 352 (1951).

⁹¹ 50 U.S.C. app. § 533(b).

record. This is done when the record demonstrates pre-service default or a continuous pattern of tardy payments.⁹²

Having determined that the servicemember “owned” the property, the trial court must then form an opinion on the ability of the servicemember to meet his/her financial obligations. That is, the court must determine whether military service has materially affected the servicemember’s ability to discharge his/her pre-service responsibilities in the manner agreed upon. As one court has stated, “[t]he criterion, then, is a combination of two factors, *i.e.*, (1) whether the defendant’s inability to comply results by reason of such military service, and (2) that such military service has materially affected the ability to comply.”⁹³

To secure relief, the servicemember should provide the court with sufficient financial information on the material effect of military service.⁹⁴ Two pieces of financial information are always essential: pre-service income and in-service income. Pre-service income, out of which the agreed mortgage payments were previously paid on time,⁹⁵ is considered as a standard. Typically, in-service income must not only be smaller, but it must be insufficient to reasonably maintain the servicemember before a court will grant relief.⁹⁶ Proof of in-service income should include showing the amount of (1) military pay and allowances, (2) allotments to dependents, and (3) any other nonmilitary income, even if earned by dependents. In-service income should be treated as a

⁹² *Franklin Soc. for Home-Bldg. & Sav. v. Flavin*, 40 N.Y.S.2d 582 (1943), *aff’d*, 291 N.Y. 530, 50 N.E.2d 653 (1944).

⁹³ *Hunt v. Jacobson*, 33 N.Y.S.2d 661, 664 (Sup. Ct. 1942). *See generally* Karen H. Switzer, *Mortgage Defaults and the Soldiers’ and Sailors’ Civil Relief Act: Assigning the Burden of Proof When Applying the Material Effect Test*, 18 REAL EST. L.J. 171, 177-84 (1989).

⁹⁴ The Act does not state which party has the burden of proof. The Supreme Court in *Boone v. Lightner*, 319 U.S. 561 (1943), ruled that the burden of going forward would be determined by the trial courts. In some cases, the servicemember was required to prove material effect. *See, e.g., Queens County Sav. Bank v. Thaler*, 44 N.Y.S.2d 4 (Sup. Ct. 1943). In other cases the one bringing the action against a service member had the burden of proving lack of material effect. *See, e.g., Meyers v. Schmidt*, 46 N.Y.S.2d 420 (County Ct. 1944). In any event, the servicemember should be prepared to go forward with sufficient evidence to support his/her position.

⁹⁵ *Meyers*, 46 N.Y.S.2d at 423 (“promptness in the payment of a bill may indicate ability to pay, the failure to be prompt in the payment of bills does not necessarily indicate inability to pay”).

⁹⁶ *See, e.g., Hempstead Bank v. Collier*, 289 N.Y.S.2d 797, 799 (Sup. Ct. 1967) (“net earnings have not been materially affected by his military service and in fact may actually have been improved”).

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net amount, because proof of any additional expense caused by military service is proper. When material effect is found, the courts exercise their discretion in fashioning appropriate relief.⁹⁷

d. Nature of Relief. In a mortgage foreclosure proceeding, the Act generally provides the servicemember with three types of relief, which, under proper circumstances, are as follows:

(1) A stay of the proceedings, or an extension of the maturity dates of his/her obligations by way of diminished payments;

(2) Where foreclosure judgment has already been ordered, a reopening or setting aside of the judgment in order that the reviewer may assert a defense;⁹⁸ and

(3) Where a sale has been had under a judgment of foreclosure, invocation of the statutory redemption period, extended by a period equal to his/her military service.⁹⁹

The extent of the mortgagor's financial disability resulting from military service heavily influences a court's decision on the measure of relief to be granted. Courts attempt to make equitable disposition of individual cases on their particular facts, in an effort "to preserve the interests of all parties."¹⁰⁰ This effort frequently results in granting the mortgagor, in appropriate cases, some form of conditional relief.¹⁰¹

⁹⁷ See, e.g., *Brown Serv. Ins. Co. v. King*, 24 So.2d 219 (1945).

⁹⁸ The case should be examined, in the event of a default judgment, to determine whether there was either a false affidavit or a failure to file an affidavit as is required by 50 U.S.C.S. app. § 521 (LEXIS 2006). Such a defect may affect the validity of the judgment obtained. *Wilkin v. Shell Oil Co.*, 197 F.2d 42 (10th Cir. 1951)

⁹⁹ See 50 U.S.C. app. § 526. See also *Illinois Nat'l Bank of Springfield v. Gwinn*, 107 N.E.2d 764 (1952); *Radich v. Bloomberg*, 54 A.2d 249 (1947); *Flagg v. Sun Inv. & Loan Corp.*, 373 P.2d 226 (Okla. 1962).

¹⁰⁰ 50 U.S.C. app. § 533(b)(2).

¹⁰¹ A court's examination of the servicemember's true financial situation may be the only protection for the lender, even in cases where the soldier obtained a mortgage after commencing active service. See Bruce H. White and William L. Medford, *The Soldiers' and Sailors' Civil Relief Act-Are You Stayed from Obtaining Relief from the Automatic Stay?*, 18 AM. BANKR. INST. J. 23 (1999).

Conditional relief usually involves a stay of the foreclosure proceedings on condition that the mortgagor makes some partial periodic payment on the outstanding mortgage debt.¹⁰² In its discretion, the court determines to which of the incidents of the debt the payment will be applied. Although 50 U.S.C. app. § 533 prescribes no priority of application, a pattern has emerged from the cases. Usually, payments are applied in the following order: current and accrued taxes; hazard insurance; interest on the debt; and principal. Arrearages and FHA mortgage insurance premiums have been inserted in the priority scale in various fashions. So also have the application of sums from casualty insurance recoveries, amounts held in escrow by the mortgagee, and property surpluses.¹⁰³ Sometimes, when a court has granted a stay and ordered partial payments, the court has also required the servicemember to make periodic sworn statements of his/her financial condition either to the court or to the mortgagee.¹⁰⁴ Conditional stay orders occasionally grant a mortgagee the right to apply for an amended stay order if the mortgagor's ability to discharge his/her debt becomes less impaired.¹⁰⁵ Such an amendment is within the court's power as a matter within its equitable powers and its continuing jurisdiction over the case.

e. Timing of Court Order. Under the prior law, there was some confusion over a requirement for a court order prior to foreclosure and sale of mortgaged property. This stemmed from language indicating that the foreclosure was not to take place “unless upon an order previously granted by the court.”¹⁰⁶ A New Jersey Court had held that any such order must have been granted prior to the servicemember's entry on active duty¹⁰⁷ while a New York court held that the order must have been granted prior to foreclosure; that is, not before the servicemember's entry on active duty.¹⁰⁸ This should no longer be an issue given the provision indicating that the “court order [be] granted *before* such sale, foreclosure, or seizure.”¹⁰⁹

¹⁰² See, e.g., *Fed. Nat'l Mortgage Ass'n v. Deziel*, 136 F. Supp. 859.

¹⁰³ See *Brown Serv. Ins. Co. v. King*, 24 So.2d 219; *R.R. Fed. Sav. & Loan Ass'n v. Morrison*, 40 N.Y.S.2d 319 (Sup. Ct. 1943); *Nassau Sav. & Loan Ass'n v. Ormond*, 39 N.Y.S.2d 92.

¹⁰⁴ *New York Life Ins. Co. v. Litke*, 41 N.Y.S.2d 526, *modified on other grounds*, 45 N.Y.S.2d 576.

¹⁰⁵ See, e.g., *O'Leary v. Horgan*, 39 N.Y.S.2d 555 (1943).

¹⁰⁶ 50 U.S.C. app. § 532(3) (2000).

¹⁰⁷ *Stability Bldg. & Loan Ass'n v. Liebowitz*, 28 A.2d 653 (1942).

¹⁰⁸ *Syracuse Sav. Bank v. Brown*, 42 N.Y.S.2d 156 (Sup. Ct. 1943).

¹⁰⁹ 50 U.S.C.S. app. § 533(c)(1) (LEXIS 2006). Congress' statement on this point likewise renders this a moot point:

4-8. Appraisals Following Foreclosures and Repossession

This section is designed to provide supplemental relief for all parties when an installment contract or other obligation for purchase of personal property has been stayed under other sections of the Act.

50 U.S.C. app. § 534

(a) Appraisal of property. When a stay is granted pursuant to this Act in a proceeding to foreclose a mortgage on or to repossess personal property, or to rescind or terminate a contract for the purchase of personal property, the court may appoint three disinterested parties to appraise the property.

(b) Equity payment. Based on the appraisal, and if undue hardship to the servicemember's dependents will not result, the court may order that the amount of the servicemember's equity in the property be paid to the servicemember, or the servicemember's dependents, as a condition of foreclosing the mortgage, repossessing the property, or rescinding or terminating the contract.¹¹⁰

This section is applicable in cases where a stay has been granted under this Act in “[a]ny proceeding to foreclose a mortgage on or to repossess personal property, or to rescind or terminate a contract for the purchase of personal property.”¹¹¹ In such a case, the trial court is

Section 303(c) [50 U.S.C. app. § 533(c)] on mortgages and trust deeds removes the words “unless upon an order previously granted by the court” and inserts the words “upon a court order granted before such sale, foreclosure, or seizure.” Two courts construing the original language have disagreed as to when the order must have been previously granted. One court held that the order must have been granted prior to the servicemember's entry onto active duty. *Stability Building and Loan Ass'n v. Liebowitz*, 132 N.J. Eq. 477, 28 A. 2d 653 (1942). Another court held that the order must issue prior to foreclosure on the property rather than entry onto active duty. *Syracuse Savings Bank v. Brown*, 181 Misc. 999, 42 N.Y.S. 2d 156 (N.Y. Sup. Ct. 1943). The Committee believes the latter interpretation is the correct view, being more consistent with the provision's language, “In any proceedings commenced in any court during the period of military service. . . .”

H.R. REP. NO. 108-81, at 40 (2003).

¹¹⁰ 50 U.S.C. app. § 534.

¹¹¹ *Id.* § 534(a).

empowered to appoint three appraisers to determine the value of the personal property involved. Based on the appraised value, the court may order whatever sum, if any, it believes is representative of the servicemember's equity to be paid to the servicemember or the servicemember's dependent. This payment may be made a condition precedent to foreclosing the mortgage, terminating the contract, or permitting the vendor to resume possession of the chattel. This section has been effectively employed in the situation where the value of the pledged chattel is "rapidly diminishing."¹¹²

When applying 50 U.S.C. app. § 534, the trial court is faced with the task of striking a delicate balance of the equities between the servicemember, in whose favor a ruling previously has been made by way of a stay or proceedings, and the vendor, who has neither been paid nor has the benefit of the possession of the chattel. The dependents of the servicemember should not be subjected to undue hardship as a result of losing use of the chattel. Thus, their interest should be taken into consideration as well.

In fact, the sole restriction against the court's use of this section is embodied in the clause "if undue hardship to the servicemember's dependents will not result." "Undue hardship" is difficult to define. Therefore, the courts have considered it a factual determination that must be made on a case-by-case basis.¹¹³

4-9. Storage Liens

Similar to other Title III protections is one involving foreclosure of storage liens:

50 U.S.C. app. § 537

(a) Liens.

(1) Limitation on foreclosure or enforcement. A person holding a lien on the property or effects of a servicemember may not, during any period of military service of the servicemember and for 90 days thereafter, foreclose or enforce any lien on such property or effects without a court order granted before foreclosure or enforcement.

(2) Lien defined. For the purposes of paragraph (1), the term "lien" includes a lien for storage, repair, or cleaning of the property or effects of a servicemember or a lien on such property or effects for any other reason.

¹¹² See *S & C Motors v. Carden*, 264 S.W.2d 627, 629 (1954).

¹¹³ *Commercial Sec. Co. v. Kavanaugh*, 13 So.2d 533 (La. App., 1943).

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(b) Stay of proceedings. In a proceeding to foreclose or enforce a lien subject to this section, the court may on its own motion, and shall if requested by a servicemember whose ability to comply with the obligation resulting in the proceeding is materially affected by military service----

(1) stay the proceeding for a period of time as justice and equity require;
or

(2) adjust the obligation to preserve the interests of all parties. The provisions of this subsection do not affect the scope of section 303 [50 U.S.C. app. § 533].

(c) Penalties.

(1) Misdemeanor. A person who knowingly takes an action contrary to this section, or attempts to do so, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.

(2) Preservation of other remedies. The remedy and rights provided under this section are in addition to and do not preclude any remedy for wrongful conversion otherwise available under law to the person claiming relief under this section, including any consequential or punitive damages.¹¹⁴

Congress included this section to ensure judicial safeguards in all foreclosure proceedings and to avoid the possibility that summary foreclosures allowed by some states would be held without the SCRA protections. This section pertains to the foreclosure of liens for storage of household goods or other personal property of military personnel, whether the goods were stored prior to entry upon active duty or not. Such foreclosure is prohibited during the period of military service and for 90 days thereafter, unless the lienholder obtains an order from a court and a return is made and approved by the court.¹¹⁵ Criminal penalties and civil remedies are provided, to punitive damages.¹¹⁶

¹¹⁴ 50 U.S.C. app. § 537.

¹¹⁵ *Id.* app. § 537(a)(1).

¹¹⁶ *Id.* app. § 537(c). *See, e.g.,* United States v. Bomar, 8 F.3d 226 (5th Cir. 1993) (storage liens and criminal sanctions).

4-10. Anticipatory Relief

Like the Title III benefits and protections, the non-Title III section of the SCRA calling for “anticipatory relief” is potentially quite powerful. Unlike the Title III provisions and many of the SCRA’s main provisions, it has been rarely invoked.

50 U.S.C. app. § 591

(a) Application for relief. A servicemember may, during military service or within 180 days of termination of or release from military service, apply to a court for relief----

(1) from any obligation or liability incurred by the servicemember before the servicemember’s military service; or

(2) from a tax or assessment falling due before or during the servicemember’s military service.

(b) Tax liability or assessment. In a case covered by subsection (a), the court may, if the ability of the servicemember to comply with the terms of such obligation or liability or pay such tax or assessment has been materially affected by reason of military service, after appropriate notice and hearing, grant the following relief:

(1) Stay of enforcement of real estate contracts.

(A) In the case of an obligation payable in installments under a contract for the purchase of real estate, or secured by a mortgage or other instrument in the nature of a mortgage upon real estate, the court may grant a stay of the enforcement of the obligation----

(i) during the servicemember’s period of military service; and

(ii) from the date of termination of or release from military service, or from the date of application if made after termination of or release from military service.

(B) Any stay under this paragraph shall be----

(i) for a period equal to the remaining life of the installment contract or other instrument, plus a period of time equal to the period of military service

of the servicemember, or any part of such combined period; and

(ii) subject to payment of the balance of the principal and accumulated interest due and unpaid at the date of termination or release from the applicant's military service or from the date of application in equal installments during the combined period at the rate of interest on the unpaid balance prescribed in the contract or other instrument evidencing the obligation, and subject to other terms as may be equitable.

(2) Stay of enforcement of other contracts.

(A) In the case of any other obligation, liability, tax, or assessment, the court may grant a stay of enforcement---

(i) during the servicemember's military service; and

(ii) from the date of termination of or release from military service, or from the date of application if made after termination or release from military service.

(B) Any stay under this paragraph shall be----

(i) for a period of time equal to the period of the servicemember's military service or any part of such period; and

(ii) subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination or release from military service, or the date of application, in equal periodic installments during this extended period at the rate of interest as may be prescribed for this obligation, liability, tax, or assessment, if paid when due, and subject to other terms as may be equitable.

(c) Affect of stay on fine or penalty. When a court grants a stay under this section, a fine or penalty shall not accrue on the obligation, liability, tax, or assessment for the period of compliance with the terms and conditions of the stay.¹¹⁷

The dearth of reported litigation in this area is probably due to the fact that servicemembers who are materially affected in their ability to meet their contractual obligations rarely have the opportunity to bring suit for declaratory relief. Be that as it may, this section provides a means by which a person in military service may orderly liquidate obligations and liabilities affected by that service. Unlike other provisions, it permits the servicemember to initiate the action instead of waiting for the creditor to commence proceedings.¹¹⁸ Dependents do not have independent protection under this section, as they do for Title III protections.¹¹⁹

A court may suspend enforcement of all or any portion of any obligation or liability that arose prior to entry on active duty, or any tax or assessment falling due either before or during service. To obtain relief, the servicemember must apply to the court during his/her military service, or within six months thereafter, and satisfy the court that his/her ability to meet his/her obligations are materially affected by his/her service.

This section includes all contracts and mortgages plus any other obligation or liability incurred prior to entry on active duty or any tax or assessment regardless of when the tax or assessment falls due. The servicemember may apply for relief even if s/he is not in default on the obligation. The stay under this section may be for a longer period of time than under other sections of the Act.¹²⁰ For the purposes of relief, the section is divided into two categories. The first involves obligations incurred “for the purchase of real estate[] or secured by a mortgage or other instrument in the nature of a mortgage upon real estate,”¹²¹ and the second concerns “any other obligation, liability, tax, or assessment.”¹²²

¹¹⁷ 50 U.S.C. app. § 591.

¹¹⁸ *Kindy v. Koenke*, 216 F.2d 907 (8th Cir. 1954).

¹¹⁹ The Title III protections are discussed *supra* in this chapter. *See generally* 50 U.S.C. app. §§ 531-38.

¹²⁰ *See, e.g. id.* app. § 522 (general stay provision).

¹²¹ *Id.* app. § 591(b)(1)(A).

¹²² *Id.* app. § 591(b)(2)(A).

Chapter 4 – Evictions, Leases, Installment Contracts and Other Substantive Protections

To obtain relief under this section, the servicemember is required to apply to the court.¹²³ No court, as yet, has granted relief on its own motion under the provisions of this section. The question, however, of whether or not a servicemember is entitled to a stay where there is no default and no action pending was raised in *Application of Marks*.¹²⁴ In that case, the court decided that no action need be pending and the servicemember need not be in default. Additionally, the servicemember is not prohibited from applying for relief after action has been brought or a stay granted under other provisions of the act¹²⁵ such those involving installment contracts¹²⁶ and mortgage foreclosures.¹²⁷

Once the court is satisfied that the servicemember's ability to meet his/her obligations is materially affected by his/her service, it has authority not only to stay the enforcement of the obligation, but also to set up an equitable plan or schedule for him/her to repay the debts he/she is unable to handle because of military service.

The stay provisions of this section provide that if the obligation involved is for the purchase of real estate or is secured by real estate, the court may grant a stay to allow the servicemember to suspend all payments while in service. The servicemember may then make up these back payments, plus interest, by spreading them out equally over the remaining life of the contract, plus a period of time equal to his/her time in service. For all other debts, the time allowable to make up the back payments cannot exceed a period of time equal to his/her time in service.

An example provides the best explanation of these provisions. Assume that when A enters the service, he owns a mortgaged house with 20 years remaining on the mortgage, and a boat with 5 years of installment payments remaining. While spending two years on active duty, he made reduced payments on both obligations by obtaining a stay under this section. When he is separated from the service, he has 18 more years on his mortgage and is \$1400.00 in arrears. He also has three years of payments remaining on his boat and is \$800.00 in arrears on this debt. The court may allow the \$1400.00 to be spread out for a period of 20 years and the \$800.00 for a period of two years. The maximum permissible period for the stay on the mortgage is calculated by adding

¹²³ *Id.* app. § 591(a).

¹²⁴ 46 N.Y.S.2d 755 (N.Y. Sup. Ct. 1944). *See also* Peterson v. Shaffer, 352 P.2d 281 (1960) (military service did not materially affect servicemember).

¹²⁵ New York Life Ins. Co. v. Litke, 41 N.Y.S.2d 526, *modified on other grounds*, 45 N.Y.S.2d 576 (N.Y. Sup. Ct. 1943).

¹²⁶ 50 U.S.C. app. § 532.

¹²⁷ *Id.* app. § 533.

the 18 years remaining on the mortgage at the time of separation to the two years A spent in the service. As to the installment contract on the boat, A could be permitted a maximum of 2 years to make up the arrears since the court is allowed to grant a stay equal to his term of service.

In addition, the discharged servicemember will be required to resume his regular payments at the same time he is paying the arrears. The stay described in the example is the maximum allowable stay. The court could order less time for repayment, in accordance with its equitable powers.¹²⁸

¹²⁸ See, e.g., *Application of Pickard*, 60 N.Y.S.2d 506 (1946).